No. 12,482

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC PORTLAND CEMENT COMPANY (a corporation),

Appellant,

vs.

WILLIAM A. BELLAMY,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

I. STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

This is an appeal by Pacific Portland Cement Company, a corporation, defendant in the court below, from a final judgment against it in favor of appellee, William A. Bellamy, based upon a verdict against appellant in the amount of $15,000.00. The jury returned a verdict in favor of co-defendant Southern Pacific Company (Tr. 18, 19). The action was for personal injuries allegedly sustained by appellee on April 4, 1949, on a highway east of Redwood City,

California (Tr. 2-7); jurisdiction of the trial court was, as to defendant Southern Pacific Company, based on the Federal Employers' Liability Act (45 U.S.C.A. Sec. 51 *et seq.*), and, as to appellant, on diversity of citizenship (28 U.S. Code Sec. 1332); the jurisdiction of this court is based on Title 28, U.S. Code, Sec. 1291.

The complaint (Tr. 2-7) was in two counts and alleged that the action was brought under the provisions of the Federal Employers Liability Act (45 U.S. C.A. Sec. 51, *et seq.*); it was alleged, as to the defendant Southern Pacific Company, that at the time and place of the accident the Company had negligently operated a train on which appellee was riding as a crew member and had negligently failed to protect appellee against being injured by motor vehicles using a highway paralleling the tracks at the point of the accident; as to appellant Pacific Portland Cement Company, it was alleged that on said highway appellant, through its servant, negligently operated a motor vehicle with which appellee came in contact. In a second cause of action based on the same facts, diversity of citizenship was alleged between appellee and appellant (Tr. 7).

The answer of appellant (Tr. 8-13) denied negligence and pleaded contributory negligence; the answer of Southern Pacific Company (Tr. 13-17) denied negligence and pleaded (1) contributory negligence; (2) sole negligence of the plaintiff as the proximate cause, and (3) sole negligence of appellant as the proximate cause.

At the close of the plaintiff's case, appellant and Southern Pacific Company both moved for a dismissal (Tr. 267-271), and thereafter appellant and the Southern Pacific Company moved for a directed verdict in their favor before the jury retired (Tr. 348-349).

The jury returned a verdict in favor of appellee and against appellant in the amount of $15,000.00; the verdict exonerated the Southern Pacific Company (Tr. 18-19).

Thereafter, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, appellant filed motions for judgment notwithstanding the verdict and, in the alternative, for a new trial (Tr. 24-32). Both motions were denied (Tr. 33). Thereafter appellant filed notice of appeal to this court (Tr. 34); plaintiff did not appeal from the judgment in favor of the Southern Pacific Company.

II. STATEMENT OF QUESTIONS INVOLVED.

(a) Was not the evidence insufficient as a matter of law to establish negligence on the part of appellant or its servant?

(b) Did not the evidence establish as a matter of law that appellee was guilty of contributory negligence?

(c) Was it not error for the court in its instructions to give appellee the benefit of the "workmen in the street" rule?

(d) Having given appellee the benefit of the "workmen in the street" rule, was it not error for the trial court to refuse appellant's proposed instruction that the rule had no application if the jury should find that appellee suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle?

(e) Having given appellee the benefit of the "workmen in the street" rule, was it not error for the trial court to refuse appellant's proposed instruction that the rule does not apply to the pedestrian "who may only occasionally use the street or road in the pursuit of his occupation if such occasional use on his part is a matter of choice and not a matter of necessity?

(f) Was it not error for the trial court to instruct the jury that appellee was "lawfully using" the highway where the character of appellee's use of the highway was a question of fact to be decided by the jury?

(g) Was it not error for the trial court (in giving plaintiff's proposed instruction No. 19) to assume the existence of facts not in evidence or with respect to which there was a conflict in the evidence?

III. SPECIFICATIONS OF ERROR.

1. The District Court erred in refusing to grant judgment for appellant notwithstanding the verdict, as the evidence was insufficient as a matter of law to establish negligence on the part of appellant or its servant.

2. The District Court erred in refusing to grant judgment for appellant notwithstanding the verdict, as the undisputed evidence showed that appellee was guilty of contributory negligence as a matter of law.

3. The District Court erred in instructing the jury that appellee was entitled to the benefit of the "workmen in the street" rule; more particularly, the District Court erred in instructing the jury as follows (Tr. 365-366):

> "In this connection plaintiff claims he was a workman on the highway, and that his duties required him to take the position on a highway where he was when the accident befell him. If you find from the evidence that the plaintiff was required by his duties to be upon the highway at the time he was injured, then I instruct you that the standard of care required of him was that required of a reasonably prudent person whose duties required him to be upon the highway; and he was justified in assuming that operators of motor vehicles would use reasonable care and caution commensurate with visible conditions and would approach with their cars under reasonable control. In other words, persons who are required by their work to be on a highway are not considered legally in the same light as ordinary pedestrians, because they are engaged in an occupation which requires them to be on the highway, the degree of care required of them is less than that required of an ordinary pedestrian. But while the degree of care is less than that of an ordinary pedestrian, and while such workman has a right to assume that motorists would use ordinary care for his safety, this rule does not mean

> that such a workman is not bound to use ordinary care for his own safety and may walk into the path of danger without exercising such care. Furthermore, a workman going to and coming from his place of work on the highway must use the same degree of care for his own safety as any pedestrian on the highway."

The grounds of the objections urged at the trial were that the rule was inapplicable to the facts of the case, that there was no evidence to support it, and that the evidence showed that the rule was inapplicable in the case (Tr. 392).

4. The District Court erred in refusing to instruct the jury in accordance with appellant's Separate Request for Instruction No. 2, which said proposed instruction read as follows (Tr. 20-21):

> "If you find that the plaintiff in this case suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle, you are instructed that the rule of law governing workmen in the street or road has no application to such circumstances and your decision should be governed by the general rules of law read to you by the Court concerning the duties and obligations of the ordinary pedestrian who is using a street or roadway."

Appellant objected (Tr. 392) to the Court's refusal to give said instruction on the grounds that the refusal to give the same violated the rule laid down in *Lewis v. Southern California Edison Co.,* 116 Cal. App. 44 (1931).

5. The District Court erred in refusing to instruct the jury in accordance with appellant's Separate Request for Instruction No. 3, which read as follows (Tr. 21):

> "You are instructed that the rule of law that demands less vigilance of a workman in the street does not apply to the pedestrian who may only occasionally use the street or road in the pursuit of his occupation if such occasional use on his part is a matter of choice and not a matter of necessity."

Appellant objected to the court's refusal to give said instruction on the grounds that the refusal to give the same violated the rule laid down in

> *Milton v. L. A. Motor Coach Co.* (1942), 53 Cal. App. (2d) 566.

6. The District Court erred in instructing the jury that appellee was "lawfully using" the highway where the accident occurred; more particularly, the District Court erred in giving appellee's (plaintiff's) proposed Instruction No. 18 (Tr. 22-23), reading as follows (Tr. 359):

> "It is part of the duty of the operator of an automobile to keep his machine always under control, so as to avoid collisions with other persons lawfully using the public highway. He has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant and must anticipate and expect the presence of others. This rule of law applied to the defendant Cement Company's driver in the operation of the automobile he was driving. And if you believe from the evidence that at the time

and immediately before the collision in question, he did not keep the automobile under control, so as to avoid colliding with the plaintiff, lawfully using said highway, then I instruct you that in that event he was negligent."

Appellant objected (Tr. 393) to the giving of said instruction on the ground that the same imposes an absolute duty on the part of a motorist to keep his vehicle under control at all times so as to avoid a collision with other persons, and on the further ground that the same assumed facts not in evidence, and on the further ground that there was no evidence to support the fact that the driver of the automobile was not vigilant and did not anticipate the presence of others, and on the further ground that there was no evidence to support the assumption that the driver of the vehicle did not see appellee, and on the further ground that the instruction assumed that appellee was "lawfully using" the highway.

7. The District Court erred in giving appellee's (plaintiff's) proposed Instruction No. 19 (Tr. 23-24), reading as follows (Tr. 359-360):

"You are instructed that at the time of the accident there was in effect section 510 of the California Motor Vehicle Code, providing 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on and the surface and width of the highway; and at no event at a speed which endangers the safety of persons or property.' Under this statute it was one of the duties of the Cement Company's driver in the exercise

of reasonable care to maintain a constant and vigilant lookout ahead for persons upon the highway, and particularly those the performance of whose duties require them to be thereon. If you find that the plaintiff, William A. Bellamy, was upon the highway in such a position that defendant Cement Company's driver, in the exercise of reasonable care, could have discovered his presence, but failed to do so, then and in that event the said driver was negligent. And in this connection you are instructed that the law will not permit one to say that he looked and did not see what was in plain sight; for to look is to see, and in such circumstances, you must necessarily find that the defendant's driver either failed to look, or having looked, did see the plaintiff *is* [in] such a position."

Appellant objected to the giving of said instruction on the ground (Tr. 393-394) that there was no evidence to support the theory that appellant's driver had failed to comply with his duty to maintain a constant and vigilant lookout ahead for persons upon the highway, and on the further ground that the instruction assumes that appellee was on the highway in the performance of his duties, and that he was required to be there in the performance of such duties, and that such assumption was a statement of fact which should have been left to the determination of the jury; and on the further ground that the instruction assumed that appellant's driver did not see appellee when there was no evidence to support such assumption and there was, in fact, evidence to the contrary.

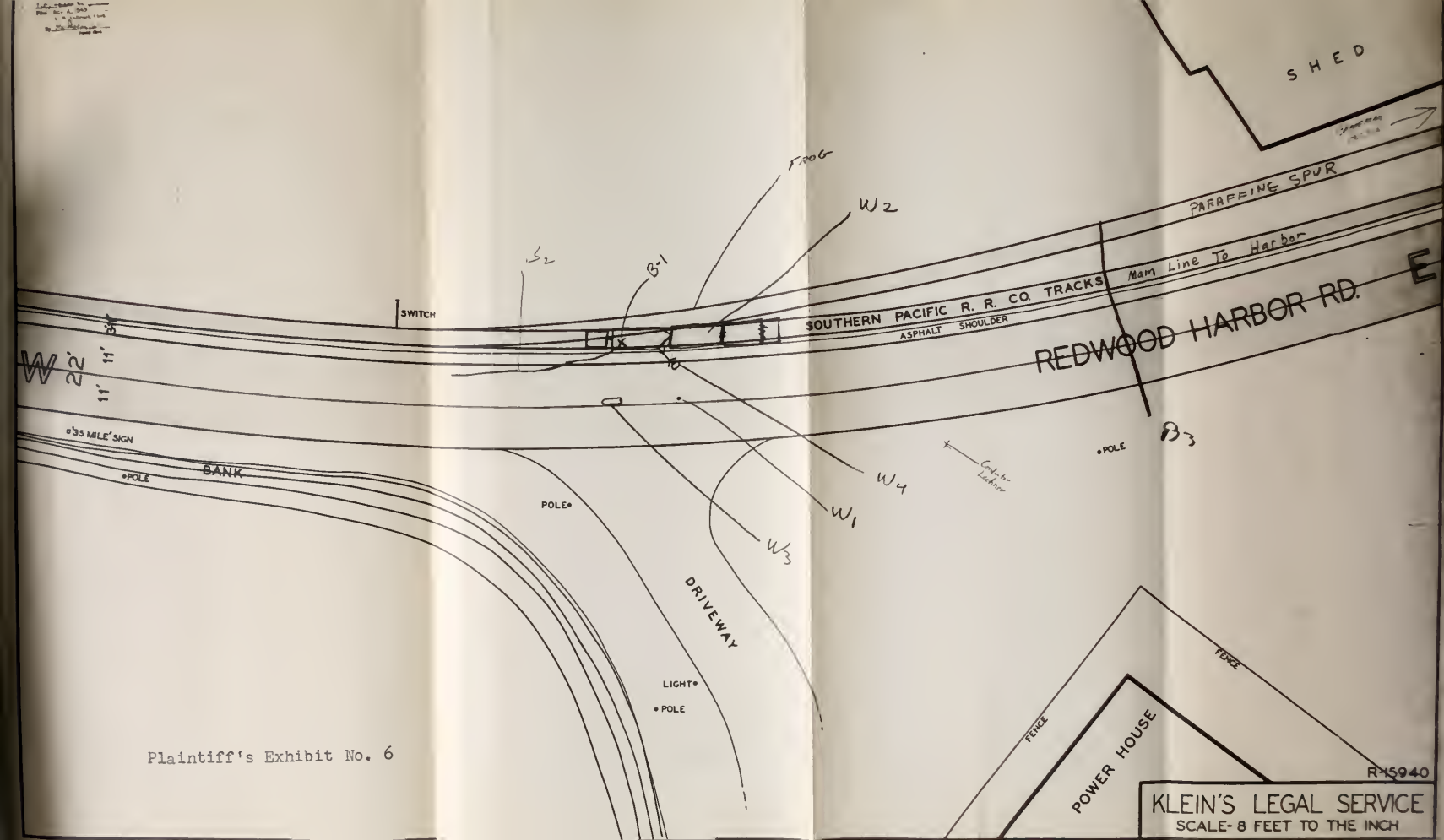
IV. STATEMENT OF FACTS.

On April 4, 1949, appellee, William A. Bellamy, was in the employ of the Southern Pacific Railroad Company (one of the co-defendants in the court below), and on that day reported for duty at the Bayshore railroad yards of the Southern Pacific Company in San Francisco at about 3:30 in the afternoon (Tr. 46). Bellamy was a brakeman at the time of the accident hereinafter described (Tr. 45).

After reporting for duty in San Francisco, Bellamy boarded a local freight train bound for Redwood City. The train departed from the Bayshore yards and went south to Redwood City, where certain train movements not involved in this accident were accomplished (Tr. 46-47).

The train crew, in addition to appellee, included Lechner, conductor, Husson and Quinlan, brakemen, and Edwards, engineer. The name of the fireman was unknown to Bellamy (Tr. 47).

The scene of the accident is shown in plaintiff's exhibit No. 6, which is a chart indicating, roughly, the following physical situation: from the main line of the Southern Pacific Company at Redwood City, a spur track leads off in a general easterly direction. This line, or spur, intersects the Bayshore Highway east of Redwood City and then goes on in an easterly direction toward the waterfront area to the east of Redwood City. Near the scene of the accident this spur track curves slightly to the north. A paved highway, approximately 24 feet in width, in-



Plaintiff's Exhibit No. 6

cluding shoulders, parallels the spur immediately to the south. A subsidiary spur track to the Pabco (or "paraffeine") plant leads off to the northeast from the main spur track. The train involved in the accident consisted of a locomotive with one or two cars coupled on ahead of it and one or two cars coupled on to the rear of it. The "pilot", or cow-catcher of the locomotive was at all times headed to the east.

It was the intention of the train crew to run the train in to the Pabco plant, pick up a car or two, and then to come back onto the main spur, dispose of one of the cars, and then go back in on the "Pabco" spur and leave one of the cars at the Pabco plant (Tr. 50-51).

Prior to the accident, the train had already proceeded into the "Pabco" properties, which were only a short distance from the switch point connecting the main spur and subsidiary spur referred to above, and had commenced to move back toward the switch point. The engineer (Edwards) was in the engineer's position on the southerly side of the engine, next to the highway, and Bellamy was riding on the car immediately ahead of the engine, on the first step of the ladder on the southerly side of the car, at the end nearest the engine (Tr. 52).

The train was moving in a westerly direction, at 2 to 3 miles per hour (Tr. 93), at a point where the tracks were close and, roughly, parallel to the highway, when Bellamy jumped off the train (Ptf. Ex. No. 6, mark B-1), dashed out into the highway

without looking up the highway to the east (Tr. 98 and 189), and came in contact with the right rear fender of appellant's pick-up truck (Tr. 190), which was passing west-bound in about the center of the highway at the moment of impact (Tr. 328); Bellamy did not see the vehicle before coming into contact with it (Tr. 52-56; 100-101). Edwards, an eyewitness, estimated the speed of the vehicle at 30 miles per hour at the moment of impact (Tr. 175). Officer Whitmore, who investigated the accident, testified that the vehicle came to rest about 30 feet west of the point of impact (Tr. 281).

Bellamy testified that after jumping from the train he ran out into the highway (Tr. 98) with his back to the east (Tr. 54), running in a southwesterly direction (Tr. 112).

Edwards testified that after Bellamy jumped from the train "he was sort of sidestepping toward the center of the road" (Tr. 188) and that "he was backing against the current of traffic, backing into the road" (Tr. 189).

Both Edwards (Tr. 189) and Bellamy (Tr. 98) testified that *after jumping off the train Bellamy did not look up the highway to the east, and there was no contrary testimony.* The vehicle with which Bellamy came into contact had approached from the east.

Carlson, driver of appellant's vehicle, testified that he approached the scene in about the center lane of the highway, that he saw Bellamy "hanging on the box car" (Tr. 328) and that as he was about opposite

Bellamy he "got a glimpse out of the corner of my eye of him letting loose, and then I felt a bump, and I came to an immediate stop" (Tr. 329).

Edwards testified (Tr. 175) that Carlson "swerved to the south side of the road to try to prevent hitting Mr. Bellamy, and the rear end, the rear fender, caught Mr. Bellamy in the back."

Bellamy testified that he had jumped off the train for the reason that he was unable to see both the engineer and the men at the rear end of the movement, from whom he apparently was required to pass signals to the engineer (Tr. 60-61). It was Bellamy's "own choice" to conduct himself as he did at the time and place of the accident (Tr. 209-211).

Bellamy testified that he was well aware of the fact that the harbor road paralleled the spur track at the point of the accident, that he knew the road was heavily traveled, and that passing cars could be expected from either direction (Tr. 83).

Although some of the exhibits show a sign indicating a 35-mile speed limit on the highway at the scene of the accident, this sign was placed on the highway after the accident occurred (Tr. 74); the *prima facie* speed limit on the harbor road at the time and place of the accident was 55 miles per hour (Tr. 284).

A short time before Bellamy dropped off the train, he had been looking to the east watching the crew at the rear end of the movement, but before leaving the train had turned around and faced west before he

dropped off (Tr. 91). He apparently had to step over one rail of the main spur before he got onto the highway and he testified that he ran out into the highway and ran diagonally forward in the same direction as the movement of the train.

Bellamy's testimony as to his movements after he stepped off of the moving train is as follows (Tr. 97-99):

"Q. When you stepped down, you say you stepped between the rails, just about midway, center between the rails, the center line of the track about, approximately?

A. The best I remember, I just stepped down near the outside rail, the nearest rail on the highway.

Q. How far from the nearest rail?

A. I would say near the rail.

Q. Well, how far is near? I am sorry.

A. Well——

Q. The best you can, please. A foot or two?

A. I would say six inches or a foot, somewhere; just to be safe in missing the rail—a foot.

Q. Then you stepped over that rail?

A. That is the best of my remembrance.

Q. And then ran forward in the direction whence the engine was going and diagonally, is that right?

A. That is right.

Q. Out into the highway?

A. Yes.

Q. About how many steps did you take from the time you first stepped down until the time you were hit?

A. It would be pretty hard to say. Ten, fifteen steps.

Q. About ten or fifteen normally running-walking steps?

A. Maybe twenty.

Q. Fifteen or twenty steps?

A. Yes.

Q. Sort of a running motion, was it, Mr. Bellamy?

A. I would call it a running motion.

Q. You would call it running. Then from the time you stepped off of the car until the time you were hit, did you ever turn around to see whether there was anything coming from behind you?

A. Not after I hit the highway, no, sir, I hadn't time to turn around.

Q. I am not asking you that question; I am asking you if you looked, turned around and looked at all at any time not only after you hit the highway, but while you were still in a place of safety in between those two rails on the main line track. Did you turn and look then?

A. Yes, sir, I turned around.

Q. After you detrained, after you got off?

A. Not after I left the train.

Q. You didn't look around in the direction from which this truck was coming at any time after you got off?

A. Not after, no, sir, after.

Q. Indeed at any time after you changed your position on the side of the car from looking towards the crew to looking towards the engineer, is that right?

A. That is right."

Bellamy testified that he dropped off of the train at Point B-1 on plaintiff's exhibit 6 (Tr. 111), and admitted that from that point he *"broke into a run and ran in a southwesterly direction diagonally out into the highway"* (Tr. 112). He was running at the time the impact occurred (Tr. 112). As stated by Bellamy, "it was a running movement; it wasn't a natural walk" (Tr. 113).

To summarize the foregoing: a small train of cars was backing out of the subsidiary spur from the "Pabco" plant. It was the intention of the members of the crew to bring the train out onto the main spur. A highway leading from Redwood City to the harbor area paralleled the spurs at the point of impact and was in very close proximity to them. The plaintiff was a brakeman member of the crew operating the train and was thoroughly familiar with the physical surroundings and with the fact that a heavily traveled highway paralleled the tracks; immediately before the accident, as the train was proceeding westerly at a speed of from two to three miles per hour, appellee was riding on the southwest corner of the car immediately in front of, or to the east of, the locomotive, next to the highway. He glanced toward the engineer of the train, jumped off of the car on which he was riding, stepped into the highway without looking towards the east, from which direction appellant's vehicle approached, and ran in a westerly or southwesterly direction out into the center of the highway, where he came into contact with the right rear fender of appellant's vehicle. At the moment of impact the

vehicle was headed in a westerly direction and was proceeding (according to the testimony of the engineer, an eyewitness to the accident) at a speed of about 30 miles per hour.

It was not denied that from the moment plaintiff jumped from the train until the moment of impact he at no time looked up the highway to his left but, on the contrary, proceeded on the run out into the stream of traffic without looking out for vehicles approaching from the east, and that he came into contact with the right rear fender of just such a vehicle.

V. ARGUMENT.

A. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH NEGLIGENCE ON THE PART OF APPELLANT OR ITS SERVANT.

We have outlined above the facts involved in the accident out of which the appellee's injuries arose. At the time of the accident appellant's servant, according to the undisputed testimony, was driving appellant's vehicle in a westerly direction in about the center of the highway which paralleled the railway tracks on which a train was moving two or three miles an hour in a westerly direction; appellee jumped off the train to the ground, took a couple of steps towards the highway, and, *without looking in the direction from which traffic was to be anticipated,* ran out into the highway with his back to oncoming traffic and ran into the right rear fender of appellant's passing vehicle (Tr. 97-99, 112, 189).

The testimony is also undisputed that appellant's servant, driver of the car, observed appellee in his position on the freight car and caught a glimpse of appellee as he jumped off the freight car; that immediately afterwards appellant's servant felt a bump on his car, stopped, and discovered that appellee had come in contact with his right rear fender. (Tr. 328-329.)

It is also undisputed that the *prima facie* speed limit on the highway at the time and place of the accident was 55 m.p.h. (Tr. 284.) It is also undisputed that appellee's crossing of the highway, or attempt to cross it, took place at a point which was neither a marked cross-walk or at an intersection. (Ptf. Ex. 6.)

The highest speed attributed to appellant's vehicle by the only eyewitness other than appellant's servant was 30 m.p.h. at the moment of impact. Appellant's servant placed a lower speed in his testimony, but we assume for the purpose of this argument that the 30-mile estimate given by the witness Edwards is controlling.

It is the general rule that "no man can be expected to guard against events which are not reasonably to be anticipated, or are so unlikely that the risk would commonly be disregarded". *(Prosser on Torts,* p. 221.)

The driver of a vehicle lawfully moving on a highway cannot be held to anticipate that a pedestrian will suddenly abandon his position of safety at the side of a highway, dash out into the highway, and

run into the right rear fender of such vehicle. Accordingly, under the rule that no man can be held liable for failing to anticipate that which, as a matter of law, cannot be reasonably anticipated, appellant's servant was not bound (we submit) to anticipate the extraordinary turn of events which resulted in appellee's injuries.

In *Schooley v. Fresno Traction Company* (1922), 56 Cal. App. 705, in which judgment for plaintiff was reversed, it was held as a matter of law that the operator of a streetcar "could not be charged with a duty to anticipate that anyone would suddenly step from a place of safety onto the car tracks in the middle of a block, directly in front of an approaching streetcar".*

The court in the cited case stated "the person in charge of a car with a clear track before him has a right to assume that people will not suddenly undertake to cross in front of it", quoting from *Driscoll v. Market Street etc. Co.,* 97 Cal. 553.

A similar holding appears in *Depons v. Ariss* (1920), 182 Cal. 485, in which judgment for the defendant was affirmed. The trial court's decision was based upon the fact that plaintiff had failed to establish negligence on the part of the defendants, since it appeared that the deceased had stepped in front of a moving vehicle. The court said "It was shown that deceased left a position of safety and put himself di-

*The rule is the same whether a streetcar or an automobile is involved. See *Wing v. Kishi* (1928), 92 Cal. App. 495.

rectly in the path of an approaching truck. This evidence was sufficient to support the conclusion of the trial court. Under these circumstances no duty was imposed upon the driver of the truck to assume that the deceased would suddenly expose himself to imminent peril. On the contrary, he had a right to conclude that he would not recklessly move directly in front of the approaching machine."

In the instant case, it is true that had appellant's servant not been on the highway at the time and place of the accident, the accident would not have occurred. This fact, of course, does not serve to constitute negligence on the part of appellant's servant. He was driving along the highway, as he had a right under the law to do, and, under the authorities above set out, was not bound to anticipate that appellee—in a position of safety when observed by appellant's servant—would suddenly abandon his position of safety and dart out into the stream of traffic.

It follows that the evidence was insufficient, as a matter of law, to establish any negligence whatsoever on the part of appellant's driver.

B. EVEN ASSUMING (WITHOUT CONCEDING) THAT APPELLANT'S SERVANT WAS NEGLIGENT IN OPERATING APPELLANT'S VEHICLE, THE UNDISPUTED TESTIMONY ESTABLISHES, AS A MATTER OF LAW, THAT APPELLEE WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WHEN HE ABANDONED A POSITION OF SAFETY AT THE SIDE OF THE HIGHWAY AND, WITHOUT LOOKING, RAN INTO THE STREAM OF TRAFFIC, WITH HIS BACK TOWARDS APPROACHING VEHICLES, AND CAME IN CONTACT WITH THE RIGHT REAR FENDER OF APPELLANT'S PASSING VEHICLE.

We are aware that appellate courts do not weigh conflicts in evidence of negligence. However, where, as here, the evidence is undisputed and may be said to "point unerringly" (*Anthony v. Hobbie* (1945), 25 Cal. (2d) 814 at 818) to the conclusion that plaintiff's conduct constituted negligence as a matter of law, the judgment is without support in the evidence and is erroneous.

We would not be raising this point if there were a conflict in the evidence on the question of whether or not appellee looked before he ran into the stream of traffic on the highway. He himself swears that he did not look and that, on the contrary, after he dropped off the train he ran out into the highway with his back to westbound traffic (Tr. 97-99). Edwards, also an eyewitness, confirms appellee's sworn testimony that he did not look in the direction of approaching traffic before he went out into the highway with his back towards such traffic, and that it was a westbound vehicle with which appellee came in contact (Tr. 189).

That a pedestrian "who crosses a well-lighted thoroughfare other than on a crosswalk, in a diagonal line and with his back partly turned to approaching traffic and is struck by a car approaching from the quarter from which traffic was to be expected" is guilty of negligence as a matter of law was held in *Mundy v. Marshall* (1937), 8 Cal. (2d) 294. The court said that under the facts of the case "the trial court was justified in concluding that the decedent was contributorily negligent as a matter of law and was correct in taking the case from the jury".

Numerous cases are in accord.

In *Chase v. Thomas* (1935), 7 Cal. App. (2d) 440, judgment for the plaintiff was reversed where it appeared that plaintiff had stepped from a place of safety and, without looking, had walked into the highway where defendant's vehicle struck him. The court stated: "Plaintiff had no right to assume that drivers of such vehicles would slow down in order to give way to him. He was under the positive duty, under the provisions of the statute, to yield the right of way to others. He violated this statutory provision. Instead of allowing the automobile to pass in front of him he stepped directly in front of it. The driver of the car was afforded no opportunity to stop after plaintiff stepped into the way. These acts upon plaintiff's part, being a violation of the provisions of the statute in that plaintiff instead of yielding the right of way claimed it for himself, constituted negligence *per se*" (7 Cal. App. (2d) 443).

The court went on to state that "Had he not violated the law or had he used ordinary care for his own safety, the accident would not have happened. His negligence therefore bars recovery" (7 Cal. App. (2d) 444).

The duty of pedestrians, before crossing a street, to look in the direction from which traffic may be expected is not fulfilled by looking once and then looking away, but on the contrary is "a continuing duty and was not met by looking once and then looking away," as stated in *Deike v. East Bay, etc. Co.* (1935), 7 Cal. App. (2d) 544, 550. In the case referred to it appeared that the plaintiff, without looking, had gone from a place of safety out into the pathway of an oncoming streetcar. The court stated that "his conduct amounted to contributory negligence as a matter of law".

In connection with the case last above cited, we point out that there is no evidence whatsoever that appellee in the instant case at any time looked in the direction of approaching traffic after he abandoned his position of safety on the side of the train.

The fact that a few moments previously he had been looking to the east, watching his fellow-crewmen, cannot be claimed to have fulfilled his duty to look again before dashing out into the highway. The testimony is without conflict that appellee's view to the eastward was obscured by reason of the fact that the accident happened at about the apex of a curve. He had been looking to the east—he does not say that he

had looked into the highway—a few moments before the accident, but before dropping off the train he had turned around and was looking to the west toward the engineer. He then dropped off the train onto the ground and, without again looking in the direction of oncoming traffic, dashed out into the highway, in a "running" movement, with his back to oncoming traffic, and came into contact with the right rear fender of a vehicle which was going in the same direction in which appellee was running.

That appellee's conduct under such circumstances constituted contributory negligence as a matter of law appears to be well established by numerous California cases which have had occasion to pass upon similar conduct.

In *Brkljaca v. Ross* (1923), 60 Cal. App. 431, the court stated:

> "Had the plaintiff thus looked, as he was in duty bound to do, he must have seen the lights of the defendant's approaching car and been aware of its approach. He cannot, therefore, be heard to excuse himself for proceeding across the center line of the said avenue and into the space about to be rightfully traversed by said approaching car, upon the plea that he was not aware of its approach. His act in so doing was, therefore, upon the undisputed facts of the case, negligence as a matter of law."

In *Casey v. Delelio* (1940), 39 Cal. App. (2d) 91, a judgment for the plaintiff was reversed. The court noted that by the undisputed evidence "the plaintiff

was shown to have run into the place of danger without looking for traffic," (39 Cal. App. (2d) at 93). In reversing the judgment, the court stated:

> "As long as the doctrine of contributory negligence as a matter of law is to be recognized it must be applied to a case such as this where the undisputed evidence shows that plaintiff voluntarily placed himself in a position where he could not see danger approaching from a point where a reasonable man must have anticipated it."

In *Flores v. Los Angeles Railway Corp.* (1936), 15 Cal. App. (2d) 576, a judgment for the defendant, based upon a directed verdict, was affirmed when it appeared that the plaintiff had failed to look "at any time after leaving the curb until she arrived at the streetcar track". The court held that her failure to look constituted "contributory negligence as a matter of law" (15 Cal. App. (2d) 580).

In *Horton v. Stoll* (1935), 3 Cal. App. 687, a judgment of nonsuit was affirmed on appeal where it appeared by the undisputed testimony that the plaintiff walked out into the street at a place other than a cross-walk, having apparently failed to look for "approaching cars in the directions from which they would come" (3 Cal. App. (2d) 690).

See also the following cases:

Mayer v. Anderson (1918), 36 Cal. App. 740 (judgment of nonsuit affirmed where the plaintiff, in attempting to cross a street, failed to look, and walked into a passing vehicle);

Ogden v. Lee (1923), 61 Cal. App. 493 (judgment of nonsuit affirmed where it appeared that plaintiff had walked out into the street after pulling his umbrella down over his head and thus obscuring his vision of approaching traffic);

Atkins v. Bouchet (1923), 65 Cal. App. 94 (another "umbrella" case, in which the court reversed a judgment for plaintiff on the ground that plaintiff was guilty of contributory negligence as a matter of law. The court pointed out that "plaintiff did not know of the presence of the automobile on the street until it struck her");

Chrissinger v. Southern Pacific Company (1915), 169 Cal. 619 (judgment of nonsuit affirmed where it appeared that plaintiff had, without looking, walked in front of a passing train);

Gibb v. Cleave (1936), 12 Cal. App. (2d) 468 (judgment for plaintiff reversed where it appeared that plaintiff walked out into the street when "a single glance to the front or to the left would have shown" the approaching danger; the court also observed that "a pedestrian does not exercise reasonable care by taking just one look before placing himself in the midst of oncoming traffic upon a public highway" (12 Cal. App. (2d) 471));

Klusman v. Pacific Electric Ry. Co. (1923), 190 Cal. 441 (nonsuit affirmed where it appeared that plaintiff had failed to look in both directions before stepping upon the tracks);

Finkle v. Tate (1921), 55 Cal. App. 425 (directed verdict for defendants affirmed where it appeared that plaintiff had attempted to cross the street "with his vision obstructed").

We repeat that had there been any evidence whatsoever that appellee looked in the direction of approaching traffic after he dropped off the train and before he started out into the highway, we would not argue that his conduct was negligent as a matter of law, but, in the light of the foregoing authorities, and the undisputed testimony, we submit that in the instant case appellee was guilty of negligence as a matter of law and that such negligence was manifestly a proximate cause of his injuries, since, had he looked, he could have seen and avoided the impact with the right rear fender of appellant's passing vehicle.

C. AS THE "WORKMEN IN THE STREET" RULE HAS NO APPLICATION WHERE THE WORKMAN SUDDENLY ABANDONS A PLACE OF SAFETY AND, WITHOUT LOOKING, DASHES INTO THE PATH OF DANGER, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN, OVER APPELLANT'S OBJECTION, IT INSTRUCTED THE JURY THAT APPELLEE WAS ENTITLED TO THE BENEFIT OF THE RULE.

The trial court instructed the jury as follows (Tr. 365-366):

> "In this connection plaintiff claims he was a workman on the highway, and that his duties required him to take the position on a highway where he was when the accident befell him. If you find from the evidence that the plaintiff was required by his duties to be upon the highway at

the time he was injured, then I instruct you that the standard of care required of him was that required of a reasonably prudent person whose duties required him to be upon the highway; and he was justified in assuming that operators of motor vehicles would use reasonable care and caution commensurate with visible conditions and would approach with their cars under reasonable control. In other words, persons who are required by their work to be on a higthway are not considered legally in the same light as ordinary pedestrians, because they are engaged in an occupation which requires them to be on the highway, the degree of care required of them is less than that required of an ordinary pedestrian. But while the degree of care is less than that of an ordinary pedestrian, and while such workman has a right to assume that motorists would use ordinary care for his safety, this rule does not mean that such a workman is not bound to use ordinary care for his own safety and may walk into the path of danger without exercising such care. Furthermore, a workman going to and coming from his place of work on the highway must use the same degree of care for his own safety as any pedestrian on the highway."

Appellant duly excepted to the giving of the instruction (Tr. 392).

It is a well recognized rule that "the laborer in the street is required to use a lesser quantum of care than a pedestrian". *Scott v. San Francisco* (1949), 91 C.A. (2d) 887.

That rule, however, has no application where (as in the instant case) the person claiming its benefit

suddenly abandons a place of safety and steps into the pathway of danger.

Thus, in *Lewis v. Southern California Edison Company* (1931), 116 Cal. App. 44, a swamper on a garbage truck, whose duties at least a part of the time required him to work in the street, jumped down off the truck into the path of a vehicle which was approaching, without warning, at 30 miles per hour. A new trial was granted after a verdict for the plaintiff, who, on appeal, relied upon the "workmen in the street" rule. In holding that the rule was not applicable, the court stated:

> "We believe such rules do not apply if the workman, as in this case indicated, without notice, suddenly jumps from the left running-board of the garbage truck in front of the approaching car."

A review of the cases in which courts have approved a "lesser quantum of care" for workmen in the street than for ordinary pedestrians shows that the rule has been applied to the normal case of a man, already at work in the street, who cannot be expected to interrupt his work with constant efforts to ascertain whether anyone is about to run him down, in view "of the necessity of his giving attention to his work" (*Hedding v. Pearson* (1946), 76 C.A. (2d) 481).

Thus, in *Jones v. Hedges* (1932), 123 Cal. App. 742, the deceased was struck by a car while helping to apply tar to a highway, and was working in smoke

which obscured approaching traffic from his view. Held, rule applicable.

In *Mecham v. Crump* (1934), 137 Cal. App. 200, plaintiff, a road foreman, whose duties required his presence on the highway, stooped over in the highway to pick up a key used in one of the vehicles under his command. He was struck while stooping over. Held, rule applicable.

In *Porter v. Rasmussen* (1932), 127 Cal. App. 405, plaintiff was cutting a hole in the street with an "air gun" when a vehicle struck him from the rear. Held, rule applicable.

We have searched in vain for any case which holds that a litigant is entitled to the benefit of the rule where (as in the instant case) he suddenly projects himself from a place of safety into the pathway of danger. The *Lewis* case, supra, holds the rule inapplicable under such circumstances.

See also *Warnke v. Griffith Co.* (1933), 133 C.A. 481, where the court declined to apply the rule when the workman chose a perilous course of conduct when a safer one was available to him.

The analogy to the instant case is clear: Bellamy had the choice, after dropping off the train, of (i) momentarily glancing in the direction from which traffic might be expected, or (ii) running blindly out into the stream of traffic without looking. There was no evidence whatsoever that his duties required him to run blindly into the street with his back to approaching traffic. Having of his own free will elected

the perilous alternative, he was not entitled to the benefit of the rule.

In *Kenna v. Central Pacific R. R. Co.* (1894), 101 Cal. 26, judgment of nonsuit was affirmed. It appeared that the decedent's duties required him to be in the vicinity of a railroad track, that he stepped onto the track and walked with his back to an approaching locomotive, which struck and killed him. Said the court at p. 29:

> "The law demands that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection, and does not permit a recovery for damages resulting from a neglect of this rule. Walking upon the line of a railroad where trains are at any time liable to pass is itself dangerous, and to do so without looking to see whether a train is approaching is negligence *per se.*"

None of the cases dealing with the "workmen in the street" rule purport to exculpate the workman from the duty to use ordinary care; they merely exact a lower quantum of care; we submit that, as a matter of law, a workman who dashes from a place of safety into the path of an approaching danger, without looking, has not observed even a minimum standard of care.

Had Bellamy already gained the center of the highway and been (perhaps) walking towards the west giving signals, etc. it might be argued that he would at such time be entitled to the benefit of the rule. That was not the case, however, here, because the undisputed evidence showed that Bellamy jumped off

the train and, without looking, *ran* out into the center of the highway where he came in contact with the right rear fender of appellant's passing vehicle.

D. IN REFUSING APPELLANT'S REQUEST TO INSTRUCT THE JURY THAT THE "WORKMEN IN THE STREET" RULE HAD NO APPLICATION IF THE JURY SHOULD FIND THAT APPELLEE "SUDDENLY LEFT A PLACE OF SAFETY WITHOUT NOTICE AND PROCEEDED INTO THE PATH OF THE APPROACHING VEHICLE", THE TRIAL COURT COMMITTED PREJUDICIAL ERROR.

It was the contention of appellant (as stated under point C, supra) that the "workmen in the street" rule was inapplicable in the circumstances of this case.

Nevertheless, when the trial court gave an instruction based on the rule, appellant proposed the following qualifying instruction (Separate Request for Instructions No. 2 (Tr. 20-21)):

> "If you find that the plaintiff in this case suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle, you are instructed that the rule of law governing workmen in the street or road has no application to such circumstances and your decision should be governed by the general rules of law read to you by the Court concerning the duties and obligations of the ordinary pedestrian who is using a street or roadway."

Appellant duly excepted to the trial court's refusal to give the proposed qualifying instruction (Tr. 392).

The qualifying instruction proposed by us authorized the jury, if it found in accordance with the language of the instruction, to apply the general rules of law governing ordinary pedestrians.

That the "workmen in the street" rule does not apply to an individual who "suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle" was held in *Lewis v. Southern California Edison Co.* (1931), 116 Cal. App. 44, which we have discussed under point C, supra.

It is submitted that the court's failure to give the proposed qualifying instruction created in the jury the impression that the "workmen in the street" rule applied even though the jury were to believe from the evidence (and the evidence [Tr. 97-99] was without conflict on the point) that Bellamy "suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle."

For the reasons above stated, it is clear, we submit, that the court's refusal to grant our proposed instruction was prejudicial error.

E. IN REFUSING APPELLANT'S REQUEST TO INSTRUCT THE JURY THAT THE "WORKMEN IN THE STREET" RULE DOES NOT APPLY TO THE PEDESTRIAN "WHO MAY ONLY OCCASIONALLY USE THE STREET OR ROAD IN THE PURSUIT OF HIS OCCUPATION IF SUCH OCCASIONAL USE ON HIS PART IS A MATTER OF CHOICE AND NOT A MATTER OF NECESSITY", THE TRIAL COURT COMMITTED PREJUDICIAL ERROR.

Appellant requested the following instruction (Separate Request for Instructions No. 3, Tr. p. 21):

> "You are instructed that the rule of law that demands less vigilance of a workman in the street does not apply to the pedestrian who may only occasionally use the street or road in the pursuit of his occupation if such occasional use on his part is a matter of choice and not a matter of necessity."

Appellant duly excepted (Tr. 392) to the trial court's refusal to give the proposed instruction.

It was our theory of the case that the most that could be said for Bellamy's actions at the time of the accident was that his duties did not *necessarily* require his presence in the middle of the heavily travelled highway. As pointed out by Edwards (Tr. 209-211), it was Bellamy's "own choice" to go into the highway. There could be no denying that it was his own choice to run blindly into the highway from a place of safety without looking and with his back to approaching traffic.

That the "workmen in the street" rule does not apply to the pedestrian who may only occasionally use the street or road in the pursuit of his occupation if such occasional use on his part is a matter of choice and not a matter of necessity is established in *Milton v. L. A. Motor Coach Co.* (1942), 53 C.A. (2d) 566.

In the *Milton* case, a photographer was injured while taking photographs in the street. The court held, in reversing judgment for the plaintiff, that the "workmen in the street" rule "cannot be extended to protect photographers or others who may occasionally use the streets in the pursuit of their occupation if

they do so from choice and not from necessity" (53 C.A. (2d) 573), citing *Carlsen v. Diehl* (1922), 57 C.A. 731, 737).

Whether appellee, at the time of his injuries, was *required* to be where he was, or whether he was of the class of worker described in the *Milton* case, was a question of fact for the jury, and the jury should have been properly advised as to the law applicable to both alternatives, rather than solely as to the law applicable to the alternative more favorable to appellee.

In addition to appellant's proposed separate request for Instructions No. 3 above quoted, appellant also tendered the following proposed instruction (appellant's separate request for Instruction No. 4, Tr. 21):

> "If you find that the plaintiff was not forced to be or to remain in the place where he was injured on the roadway as a matter of duty, although he may have had a right to be there, and that his use of the roadway in the manner in which he used it at the time and place in question was a matter of choice and not a matter of necessity, then you are instructed that the plaintiff is not to be classed with laborers engaged in street work, and was, under such circumstances, required to exercise the ordinary care that is required of the ordinary pedestrian under such circumstances."

Appellant duly excepted to the trial court's refusal to give the proposed instruction (Tr. 392).

We do not separately argue the court's error in refusing to give appellant's proposed Separate Re-

quest No. 4, since the same reasons support our claim of error with respect to Separate Request No. 4 as do those in support of our claim of error with respect to the court's refusal to grant our Separate Request for Instructions No. 3, supra.

The error of the court in refusing to give our Separate Request for Instructions No. 3 was further accentuated by language which appeared in Plaintiff's Proposed Instruction No. 19 (Tr. 23-24), which the court gave (Tr. 359-360), and to the giving of which appellant excepted (Tr. 393).

We refer to the court's instruction (Tr. 359) that "it was one of the duties of the Cement Company's driver in the exercise of reasonable care to maintain a constant and vigilant lookout ahead for persons upon the highway, and *particularly those the performance of whose duties require them to be thereon*" (Tr. 359-360).

The recital referred to, in effect, described appellee as one of a class "whose duties require them to be" on the highway. Whether appellee's duties required him to be on the highway was, again, a question of fact for the jury, and the court erred in assuming, in view of the conflicting evidence, that appellee's status as a "workman in the street" had been established as a matter of law.

F. IN INSTRUCTING THE JURY THAT APPELLEE WAS "LAWFULLY USING" THE HIGHWAY, THE COURT INVADED THE PROVINCE OF THE JURY, IN VIEW OF THE FACT THAT THERE WAS SUBSTANTIAL EVIDENCE WHICH, IF BELIEVED, WOULD HAVE ESTABLISHED THAT APPELLEE WAS NOT LAWFULLY USING THE HIGHWAY.

Appellee proposed (Plaintiff's Instruction No. 18, Tr. 22), and the court gave (Tr. 359), the following instruction:

> "It is part of the duty of the operator of an automobile to keep his machine always under control, so as to avoid collisions with other persons lawfully using the public highway. He has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant and must anticipate and expect the presence of others. This rule of law applied to the defendant Cement Company's driver in the operation of the automobile he was driving. And if you believe from the evidence that at the time and immediately before the collision in question, he did not keep the automobile under control, so as to avoid colliding with the plaintiff, lawfully using said highway, then I instruct you that in that event he was negligent."

Appellant duly excepted to the giving of the instruction (Tr. 393).

At the outset, it is to be noted that the trial court, by use of the words "he [referring to the operator of the automobile] has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant and must anticipate and expect the presence of others," inferred that appellant's driver

erroneously assumed that the road was clear, that he was not vigilant, and that he had failed to anticipate or expect the presence of others. There was no evidence anywhere in the record to support such an inference, and that portion of the instructions was therefore obviously erroneous. Carlson's testimony was otherwise (Tr. 322-343). He actually saw appellee on the train and saw him jump off the train.

Quite apart from this objection, in the last sentence of the instruction it will be noted that the court described appellee as *"lawfully using said highway."*

The general rule governing pedestrians using a highway is set out in Section 564 of the Vehicle Code on which the court instructed the jury (Tr. 362). It is quite true that workmen in the street are not compelled strictly to comply with the provisions of Section 564. See *Zumwalt v. Tryon* (1932), 126 C.A. at 583.

Violation of Section 564 of the Vehicle Code constitutes, as to an ordinary pedestrian, however, negligence *per se*. *Scalf v. Eicher* (1935), 11 C.A. (2d) 44.

Whether appellee's status was the same as that of an ordinary pedestrian or whether his duties required his presence in the middle of the highway was a question of fact for the jury. When the court characterized appellee as "lawfully using said highway" it, in effect, instructed the jury that, irrespective of any conflict in the testimony (and there was conflict [Tr. 209-211] as to whether appellee was required by his

duties to run out into the highway as he did), appellee was exempt from the requirements of Section 564 of the Vehicle Code. Since the only person in any way exempt from the provisions of Section 564 is a person whose duties *require* his presence in the highway, the court, when it characterized appellee as "lawfully using the highway", took from the jury the question of whether appellee's duties required his presence in the highway, and of whether, even assuming the "workmen in the street" rule applied, his conduct was lawful.

It is unnecessary to cite authority for the proposition that an instruction which takes from the jury a question of fact is prejudicially erroneous.

G. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING PLAINTIFF'S PROPOSED INSTRUCTION NO. 19 FOR THE REASON THAT SUCH INSTRUCTION ASSUMED THE EXISTENCE OF FACTS NOT IN EVIDENCE OR WITH RESPECT TO WHICH THERE WAS A CONFLICT IN THE EVIDENCE.

Appellee proposed (Plaintiff's Instruction No. 19, Tr. pp. 23-24) and the court gave (Tr. 359-360) the following instruction:

> "You are instructed that at the time of the accident there was in effect section 510 of the California Motor Vehicle Code, providing "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on and the surface and width of the highway; and at no event at a speed

which endangers the safety of persons or property.' Under this statute it was one of the duties of the Cement Company's driver in the exercise of reasonable care to maintain a constant and vigilant lookout ahead for persons upon the highway, and particularly those the performance of whose duties require them to be thereon. If you find that the plaintiff, William A. Bellamy, was upon the highway in such a position that defendant Cement Company's driver, in the exercise of reasonable care, could have discovered his presence, but failed to do so, then and in that event the said driver was negligent. And in this connection you are instructed that the law will not permit one to say that he looked and did not see what was in plain sight; for to look is to see, and in such circumstances, you must necessarily find that the defendant's driver either failed to look, or having looked, did see the plaintiff in such a position."

Appellant duly excepted to the giving of the instruction (Tr. 393-394).

As can be seen from the language contained in the foregoing instruction, the court characterized appellant's driver as either one who "could have discovered" appellee's presence on the highway but "failed to do so", or as one who "looked and did not see" appellee.

There was no evidence whatsoever that appellant's driver failed to discover appellee's presence on the highway or that he looked and did not see. He nowhere made the contention that he had failed to see

appellee. On the contrary, he testified (Tr. pp. 326-329) that he observed appellee riding on the freight car and that "as I got by this man hanging on the boxcar, I just got a glimpse out of the corner of my eye of him letting loose and then I felt a bump, and I came to an immediate stop".

The testimony of appellee that he dropped off the car and ran out into the highway (Tr. pp. 97-99) without looking in no way controverts Carlson's testimony that he in fact did see appellee.

Since the instruction is couched in language suggesting that appellant's driver failed to see appellee in the highway and since there is no evidence whatsoever to support a claim that appellant's driver failed to see appellee in the highway, the instruction is subject to the vice that it assumes facts with respect to which there is either no evidence whatsoever, or at least a conflict of evidence, and is therefore erroneous, since it invades the province of the jury. *Clark v. Volpa Bros.* (1942), 51 Cal. App. (2d) 173, Syl. Para. 3.

The instruction is also erroneous in referring to appellant's driver as being one of a class "the performance of whose duties require them to be" on the highway. Whether appellee's duties required him to be on the highway was a question of fact for the jury and the court's assumption of such fact improperly invaded the province of the jury and constituted error. *(Clark v. Volpa Bros.,* supra.)

VI. CONCLUSION.

In conclusion, it is respectfully submitted that the judgment should be reversed.

Dated, San Francisco, California,
May 1, 1950.

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